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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726 15

FLEISHER ENGINEERING & CONSTRUCTION CO. AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A BASS CO., ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

FRANK GIBBONS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726

FLEISHER ENGINEERING & CONSTRUCTION CO. AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ROYAL INDEMNITY COMPANY AND MARYLAND CASUALTY COMPANY, DEFENDANTS-APPELLANTS IN COURT BELOW,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY, APPELLEE IN COURT BELOW,

Plaintiff-Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the United States Supreme Court.

Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, respectfully

pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on the 12th day of December, 1939, in the action entitled United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratory against Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company (R. 71) which affirmed a judgment of the United States District Court, for the Western District of New York, in said action hereinafter referred to.

Opinions Below

1. An opinion was written in the United States Circuit Court of Appeals by Hon. Augustus N. Hand (R. 65-71), published 107 F. (2d) 925.

2. Opinion of Hon. John Knight, District Judge, rendered in this action (R. 34) (Not published).

3. Opinion of Hon. John Knight, District Judge, rendered in a companion action (R. 35-40) (Not published).

Judgment in District Court

Judgment in favor of United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratory against Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co., and Joseph A. Bass, doing business as Joseph A. Bass Co., for $1,130.53 (R. 55), order pursuant to which judgment was entered (R. 53 and 54), order denying previous motion on behalf of the defendants for summary judgment (R. 33).

Jurisdiction

The jurisdiction of the Supreme Court is invoked under the Judicial Code, section 240 (a), 28 U. S. C. A. 347, Act of February 13, 1925, c. 229, Sec. 1.

Statement as to Purpose and Nature of Action

This is an action at law brought in the United States District Court, for the Western District of New York, on August 24, 1938, by the United States of America, for the use and benefit of George S. Hallenbeck, d. b. a. Hallenbeck Inspecting & Testing Laboratory, as plaintiff, against Fleisher Engineering & Construction Co. and Joseph A. Bass, d. b. a. Joseph A. Bass Co. as principal, and Royal Indemnity Company, and Maryland Casualty Company, and others, as sureties, defendants, to recover the sum of $1,012.87 (R. 8), as the value of work and labor performed at the instance and request of Easthom Melvin Co. Inc. (R. 7). There was no direct contractual relationship between the use-plaintiff and any of the defendants. The Easthom Melvin Co., Inc. was a subcontractor of Fleisher Engineering & Construction Co. and Joseph A. Bass in performance of a contract between them and the United States of America, providing for the construction of superstructure of Kenfield Housing Project H-6703 in Buffalo, N. Y. under standard form of contract and government payment bond to the United States, and set forth in paragraphs sixth and seventh of the complaint (R. 5 and 6). The bond upon which recovery has been had was executed by the said contractors as principals, by the Royal Indemnity Company as surety to the extent of $359,946.00, and the defendant, Maryland Casualty Company, as surety to the extent of $79,988.00 (R. 6). The aforesaid defendants are the petitioners herein, and each of them appeared and interposed answers (R. 10-25). None of the other sureties named

in the bond were served with the summons nor in any manner appeared. The right of action depends upon whether or not the use-plaintiff has complied with the statute on the subject of notice which reads as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect to which a payment bond is furnished * * * and who has not been paid in full therefor before the expiration of a period of ninety days after the date on which the last of the labor was done or performed by him, or materials furnished or supplied by him, for which such claim is made, shall have the right to sue on such payment bond for the amount or balance thereof unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied, or for whom the labor was done and performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office, or conducts his business, or his residence, or in any manner in which the United States Marshal of the District in which the public improvement is situated is authorized by law to serve summons."
>
> Act of August 24, 1935, Chapter 642, Sec. 2, 49 Stat. 794; 40 U. S. C. A. 270 b.

(See opinion of Hon. A. N. Hand, in court below (R. 66-68).)

After issue was joined your petitioners, as defendants in the action, served written interrogatories pursuant to the provisions of Rule 33 of the Rules of Civil Procedure (R. 26-28). Answers to those interrogatories were given by the use-palintiff (R. 29). The substance of it is that the use-plaintiff alleges that written notice under the statute was given to the defendant, Fleisher Engineering & Construction Co., on June 3, 1937.

That no separate notice was given to Joseph A. Bass but a claim was made that notice to the Fleisher Engineering & Construction Co. was also notice to Bass. It was also stated in answer to question No 7 that the notice "was delivered by mail and to the best of plaintiff's information and belief was received at the office of Fleisher Engineering & Construction Co., 233 Langfield Drive, Buffalo, N. Y., either on June 3, 1937, or June 4, 1937. It was sent by ordinary mail and was deposited in the United States Postoffice Box in the vicinity of 56 Pearl St., Buffalo, N. Y., on June 3, 1937, addressed to the said Langfield Drive address" (R. 29). In answer to the eighth interrogatory it is claimed that the notice to Fleisher Engineering & Construction Co. operated as notice to Joseph A. Bass (R. 29). The notice in question was appended to the answers (R. 30 and 31). It is directed to C. Leslie Weir, Project Engineer (R. 30, fol. 89, R. 51). C. Leslie Weir represented the United States Government, and not the contractors, or either of them (R. 43, fol. 129). Upon the pleadings, the interrogatories, and answers to the same, and the affidavit of George S. Hallenbeck (R. 41-44), the District Court granted the order directing the entry of judgment appealed from (R. 53 and 54).

Questions Litigated in the District Court

1. In order to maintain an action under this statute must the notice required thereby, when given by mail, "be served

by mailing the same by registered mail'' or may some other substituted service, not provided for in the statute operate as a compliance therewith?

2. Is a notice directed to an officer, or employee, of the United States government and not to the contractor, or to anyone representing the contractor, no matter how given, sufficient notice under said statute?

Errors to be Urged

The District Court and the Circuit Court of Appeals for the Second Circuit erred in refusing to grant your petitioner's motion for summary judgment dismissing the complaint and in granting the motion of plaintiff (respondent herein) for judgment appealed from.

Review Sought in This Court

Each of the foregoing questions are presented to this Court and your petitioners respectfully pray that the same may be reviewed thereby, to the end that the applicable rule may be finally and authoritatively settled.

Reasons for Granting the Writ

This action has been brought under the Federal statute (Miller Act above quoted), to recover upon a liability there given. The Federal courts are given exclusive jurisdiction of the action. All questions which arise thereunder are strictly Federal questions which must be determined by the Federal courts.

(A) The Circuit Court of Appeals for the Second Circuit has decided the Federal questions herein involved in a way probably in conflict with applicable decisions of this Court.

While the questions here presented have never been decided by this Court in any action brought under this statute, nor, as we believe, by any Circuit Court of Appeals,

other than the decision in this case, nevertheless this honorable Court has distinctly held in similar cases that wherever a right depends upon a statutory notice, the manner in which the statute requires the notice to be given must be exactly followed.

Thatcher v. *Powell,* 6 Wheat. 119, 5 L. Ed. 221.

The rule has been declared and followed in

Burck v. *Taylor,* 152 U. S. 634, 654, 38 L. Ed. 578, 585.

In all cases of statutory construction, the words of the statute, if plain and clear, furnish the infallible guide for its interpretation. The wisdom of the law itself is a question for congress only.

Board of Lake County Commissioners v. *Rollins,* 130 U. S. 662, 32 L. Ed. 1060, 1063;

Hamilton v. *Rathbone,* 175 U. S. 414, 419, 44 L. Ed. 219, 221;

Washington Market Co. v. *Hoffman,* 101 U. S. 112, 25 L. Ed. 782.

U. S. v. *Lexington Mill & Elevator Company,* 232 U. S. 399, 410, 58 L. Ed. 658, 662;

Crooks v. *Harrelson,* 282 U. S. 55, 60, 75 L. Ed. 156, 175;

25 Ruling Case Law, 982, 59 *C. J.* 984.

This Miller Act is a successor to a previous act called the Heard Act. While that act contained no provision for notice similar to the one required by the Miller Act, it did provide that

> "if no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials * * * shall be and are hereby authorized to bring suit in the name of the United States * * * against said contractor and his sureties and to prosecute the same to final judgment and execution; provided that where suit is in-

> stituted by any such creditors on the bond of the contractor it shall not be commenced until after the complete performance of the said contract and final settlement thereof and shall be commenced within one year after the performance and final settlement of the said contract, and not later; * * * ''

Act of February 24, 1905, c. 778, as amended by the Act of March 3, 1911, c. 231, Sec. 291; 40 U. S. C. A. 270.

Under that statute this Court has held that the limitations therein imposed are conditions precedent to the right to maintain the action and must be strictly followed, otherwise the court acquires no jurisdiction to entertain the action.

U. S. ex rel. Texas Portland Cement Co. v. *McCord,* 233 U. S. 157, 162, 58 L. Ed. 893, 897;

Harrisburg v. *Rickards,* 119 U. S. 199, 30 L. Ed. 358;

Illinois Surety Co. v. *U. S.,* 240 U. S. 214, 60 L. Ed. 609;

Pollard v. *Bailey,* 87 U. S. 527, 22 L. Ed. 376;

Fourth National Bank v. *Francklyn,* 120 U. S. 747, 30 L. Ed. 825.

The Miller Act adds another condition precedent, viz.: notice.

The decision of the Circuit Court of Appeals in the case at bar is believed to be in conflict in principle with a previous decision of the same court.

Mason & Hanger Co. v. *Sharon,* 219 Fed. 526.

(See opinion of Judge Hand in court below (R. 70).)

The United States District Court for the Southern District of New York, prior to the decision of the Circuit Court of Appeals in this case, had decided this exact proposition to the contrary in the case of *U. S. A. for use etc.* v. *Albert Development Co. et al.* The unpublished opinion of Mandelbaum, D. J., is hereto annexed and marked "Exhibit A".

Another decision rendered by the District Court for the Southern Division of the Northern District of Alabama in the case of the *United States of America for the use of Birmingham Slag Company, a corporation, against W. J. Perry, etc.*, is of similar import. No opinion has been written in that case, but the decision of Judge Murphree so far as pertinent is hereto annexed and marked Exhibit B.

(B) The Circuit Court of Appeals has decided the foregoing important question of Federal law which has not been but should be settled by this Court.

The statute is a new one and is applicable throughout the country. It is important that a rule of law be established which shall universally be followed.

The well established rules of law respecting the subject should not be considered to be abrogated without a decision of this Court on the subject.

Your petitioners respectfully refer to their brief which accompanies this petition for a further elucidation of their position.

For the reasons aforesaid your petitioners respectfully pray that this petition may be granted.

FLEISHER ENGINEERING & CONSTRUCTION CO.,
JOSEPH A. BASS,
ROYAL INDEMNITY COMPANY,
MARYLAND CASUALTY COMPANY,
By FRANK GIBBONS,
Their Counsel.

FRANK GIBBONS,
Counsel for Petitioners,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

STATE OF NEW YORK,
County of Erie, ss:

Frank Gibbons, being duly sworn, says that he is over the age of twenty-one years, resides in the City of Buffalo, N. Y., and is counsel for each and all of the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the statements of facts therein contained are true to the best of his knowledge, information and belief.

FRANK GIBBONS.

Subscribed and sworn to before me this 10th day of January, 1940.

GERTRUDE B. TOWNSEND,
[SEAL.] *Notary Public, Erie Co., N. Y.*

EXHIBIT "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 4-433

UNITED STATES OF AMERICA on Behalf of and for the Use of MORRIS SPECKLER PLUMBING SUPPLY CORPORATION, *Plaintiff*,

against

ALBERT DEVELOPMENT CORPORATION and NEW AMSTERDAM CASUALTY COMPANY, *Defendants*

Memorandum

The motion is to strike out the separate defenses of the defendants contained in their answer, and for further relief, the use-plaintiff seeks a bill of particulars regarding these defenses.

Summarized, the defenses plead the use-plaintiff's failure to comply with the provisions of the Miller Act, (40 U. S. C. A. Sec. 270 a, b, c, and d), in failing to forward a notice to the defendant by registered mail as required by the statute; that the defendants have paid the sub-contractor in full, who in turn has paid the use-plaintiff in full.

From the pleadings and affidavits, it appears that the notice was forwarded to the defendants by ordinary mail-unregistered. I believe from a reading of the statute, the provision for notification by registered mail is mandatory and that ordinary mailing is insufficient to comply with the statutory provision relating thereto. This is a suit between parties having no direct contractual relationship with each other, express or implied. A failure to strictly comply could often lead to fraudulent practices. I think it is immaterial whether or not the defendants had actual notice of non-payment. The defense is sufficient in law.

With respect to the request for a bill of particulars as to this defense, the motion is granted in part and the defendants are required to furnish the use-plaintiff within ten days from entry of this order only the particulars de-

manded in Items No. 5, 6, 6a, 6b and 6c of the use-plaintiff's notice of motion.

The defenses of payment are obviously sufficient in law. Payment from the subcontractor to the use-plaintiff in full must defeat the action.

With respect to the application for a bill of particulars as to these defenses, the same is denied. Payment is an affirmative defense to be pleaded and proven by the defendants, and the state courts have ruled that generally the defendants need not furnish particulars of such defense. (Yantze Ins. Co. vs. Stark & Co., 186 N. Y. Supp. 410; Elbin v. Equitable Life Assurance Soc., 177 App. Div. 458).

Settle order on two days' notice, in accordance with the above memorandum.

Dated, September 11th, 1939.

SAMUEL MANDELBAUM, *U. S. D. J.*

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

No. 4986.

UNITED STATES OF AMERICA for the Use of BIRMINGHAM SLAG COMPANY, a Corporation, *Plaintiff*,

vs.

W. J. PERRY, P. E. KIDDER, and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, *Defendants.*

Findings of Fact and Conclusions of Law.

This action having been tried upon the facts without a jury, the Court pursuant to Rule 52 finds the facts and states its conclusions of law as follows:

On, to wit, June 30, 1938, the United States of America, through its Department of Agriculture Farm Security Administration, for the consideration of $19,967.00 agreed to be paid, let a written contract to the defendant, W. J.

Perry, for the construction of a store and filling station as a part of the Cahaba Project of the said Farm Security Administration at Cahaba Subsistence Homesteads in Jefferson County, Alabama.

(Here follows *in extenso* provisions of the contract between the Agricultural Farm Security Administration and W. J. Perry followed by complete copy of the performance bond, then followed by complete copy of the payment bond.)

The provisions of the payment bond are in the usual form and so far as pertinent reads as follows:

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated June 30, 1938, for the complete construction of a brick veneer store and filling station, including plumbing and wiring, sidewalks, curb and gutter, pavement, gasoline storage tanks, etc. at the Cahaba Project of the Farm Security Administration, United States Department of Agriculture, in Jefferson County, Alabama.

Now, therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

On July 7, 1938, the defendant, W. J. Perry, in writing sublet a part of said contract to the defendant, P. E. Kidder, Kidder's bid for such work as he was to perform being in the amount of $8,100.00. The last paragraph of said subcontract reads as follows:

> "Payments to be made as follows, we are to furnish you with money to pay your weekly payroll and the balance to be paid according to specifications as we are paid. The balance to be paid on the completion and acceptance of your work by Contractor and the Government Representative in charge."

The plaintiff, Birmingham Slag Company, furnished the defendant, Kidder, building materials which were used by him as such subcontractor in said Cahaba Project in the amount of $4,344.25, the last of which materials were furnished on September 28, 1938. Defendant, P. E. Kidder, was duly approved on July 12, 1938, as a subcontractor by the Farm Security Administration. The original contract was completed and accepted by the Farm Security Administration, on October 18, 1938, and on that date the defendant, W. J. Perry, paid the defendant, P. E. Kidder, $1,824.11 which was the balance remaining unpaid under said subcontract from Perry to Kidder, including extras, defendant Perry having had advanced Kidder money from time to time prior to said date.

On December 1, 1938, the plaintiff, Birmingham Slag Company, wrote the Farm Security Administration at Montgomery, Alabama, by ordinary mail, stating that it had an unpaid account against the subcontractor, P. E. Kidder, in the amount of $4,344.25 for materials furnished P. E. Kidder on the above mentioned project and inquiring whether the contractor had completed the work on said project and had received payment therefor.

On December 10, 1938, the Farm Security Administration at Montgomery, Alabama, wrote W. J. Perry at Winfield, Alabama, by ordinary mail, transmitting a copy of the letter of December 1, 1938, that had been received by it from the Birmingham Slag Company, and advising the defendant Perry that the final payment to him under his said contract would be held up by it pending receipt of affidavit from the Birmingham Slag Company that it had been paid in full, and that his attending to that matter as expeditiously as possible would be appreciated. This letter from the Farm Security Administration, with the enclosure mentioned, was received by Defendant Perry during the week of December 12, 1938. Said final payment so withheld amounted to $3,310.50, and has not yet been paid Defendant Perry. On December 10, 1938, by due mail the district Engineer of the said Farm Security Administration at Montgomery, Ala., wrote plaintiff a letter, which it received in due course, and which letter and its attachment read as follows:

"United States Department of Agriculture.

Farm Security Administration,

Montgomery, Alabama.

In Reply Refer to P5-D2-MLM.

Dec. 10, 1938

Subject: Cahaba Store and Filling Station.

Birmingham Slag Company,
2019 Sixth Avenue, North,
Birmingham, Alabama.

GENTLEMEN:

Your letter of December 1st, addressed to the Birmingham Office of this Administration, has been referred to us for handling.

You will please find attached a copy of a letter to Mr. W. J. Perry, contractor for the captioned project, who is responsible to this Administration for the construction of the store and filling station, informing him that it will be incumbent upon him to pay your account, or cause Mr. P. E. Kidder to pay same, before final payment to him on the aforementioned project will be made. We trust that you will hear from Mr. Perry or Mr. Kidder in the very near future.

Your attention is invited to that portion of the attached letter stating that this office will require an affidavit from you before final payment will be made to Mr. Perry.

Sincerely yours,

FRANKLYN H. MCGOWAN,
District Engineer."

Attachment.

"Farm Security Administration,

Montgomery, Alabama.

R5-D2-MLM.

Dec. 10, 1938.

Subject: Cahaba Store and Filling Station.

Mr. W. J. Perry,
Winfield, Alabama.

DEAR MR. PERRY:

Transmitted herewith is a copy of a letter from the Birmingham Slag Company, advising us of an unpaid account against Mr. P. E. Kidder, subcontractor for the Cahaba Store and Filling Station, in the amount of $4344.25.

Your final payment is being held up pending receipt of an affidavit from the aforementioned company to the effect that they have been paid in full. We shall appreciate your attending to this matter as expeditiously as possible.

Sincerely yours,

FRANKLYN H. McGOWAN,
District Engineer.

Attachment.

MLM-mee 12/10/38.

cc: MR. J. H. WOOD,
MR. P. E. KIDDER,
BIRMINGHAM SLAG COMPANY,
MR. MICHAEL L. MASCIA."

On December 12, 1938, the defendant Perry wrote by ordinary mail the Farm Security Administration at Montgomery, Alabama, which letter it received 12/13/38, inquiring as to why the final payment was being held up, which letter reads as follows:

"Building Service.

S. J. Perry,

Building Materials,

Phone No. 1-J,

Winfield, Alabama.

Dec. 12, 1938.

United States Dept. of Agriculture,
Farm Security Administration,
Attention, Mr. Franklin McGowan,
Montgomery, Ala.

I have not received my final check on the Trussville Project yet, am needing it very bad, so please see that this is sent me at once, i sent out to trussville yesterday to pay Gleen Merc the little account i was due them, regarding the other which seems has not paid up in full, Subcontractors, i feel sure they will take care of their obligations, your office through Mr. Garrison required that i pay all subcontractors in full taking receipts, this i done, Garrison informed me that their approved contracts, released me from being responsible for any of their accounts, so please see that my check is forwarded to me at once.

Yours very truly, W. J. PERRY."

And on the 15th of Dec., 1938, a reply to said letter was by ordinary mail sent to defendant Perry by said Farm Security Administration at Montgomery, Ala., which he received in due course of mail, and which reads as follows:

"Montgomery, Alabama Rd-D2-CLT

Dec. 15, 1938

Subject: Cahaba Store and Filling Station

Mr. W. J. Perry
Winfield, Alabama

Dear MR. PERRY:

This will acknowledge receipt of your communication dated December 12, 1938, requesting that the final payment on the captioned contract be released.

We regret to advise that it will be necessary that this office be furnished sufficient evidence that Mr. Kidder's obligation to the Birmingham Slag Company has been satisfied as outlined in our letter to you under date of December 10, 1938, before your final payment may be released. In this connection we invite your attention to Form FSA-GEN 65 in your contract, Page 14, Paragraph 35—Payments Withheld.

Sincerely yours
FRANKLY H. MCGOWAN,
District Engineer.

CLT/lw-12/14/38
583695-12/12/38"

Said paragraph 35 of said contract reads as follows:

"Paragraph 35, *Payments Withheld.*"

"The Government may withhold from any payment due the contractor so much as the Contracting Officer may determine is necessary to cover: (1) Claims of the Government, (2) claims filed against the Contractor related to the work, (3) *unpaid accounts of subcontractors or for labor and materials,* (4) any excess in prior payments made by the Government to the Contractor, and (5) injury or damage caused by acts or omissions of the Contractor, for which the Government might be liable. When such grounds are removed, the sum or sums withheld shall be included in the next monthly payment to the Contractor." (Emphasis supplied.)

Defendant W. J. Perry through the correspondence above set out acquired actual knowledge of the said claim of the beneficial plaintiff, Birmingham Slag Company, within the ninety day period from the date the last material was so furnished by it to the defendant Kidder, but at no time within ninety (90) days from the furnishing of the last material to defendant, Kidder, did the plaintiff, Birmingham Slag Company, serve upon the defendant Perry by registered mail in an envelope addressed to said W. J. Perry a

written notice stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, nor did it serve such notice in the manner in which the United States Marshal of this District is authorized by law to serve summons.

From the foregoing facts, the Court finds and concludes:

That the Birmingham Slag Company did not comply with Section 270 (b), Title 40, United States Code Annotated, as to giving and serving written notice upon the general contractor and defendant, W. J. Perry, and is not entitled to a recovery against the defendant, W. J. Perry, and his surety, United States Fidelity & Guaranty Company.

The Court holds as to the Plaintiff that a compliance with this Section was a condition precedent to its right to maintain this action against the general contractor and defendant, W. J. Perry, and his surety, United States Fidelity & Guaranty Company.

The Court is of the opinion that Section 270 (b), Title 40, United States Code Annotated, is unambiguous in its terms and should be construed as written.

The Court holds that the plaintiff is entitled to a judgment against the defendant, P. E. Kidder, in the amount of $4610.10 which includes the interest thereon at the legal rate from the date the last material was furnished.

A judgment will be entered in accordance with the foregoing findings and conclusions.

This the 8 day of November, 1939.

T. A. MURPHREE,
Judge of the United States District Court
For the Southern Division of the Northern District of Alabama.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726

FLEISHER ENGINEERING & CONSTRUCTION CO. AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ROYAL INDEMNITY COMPANY AND MARYLAND CASUALTY COMPANY, DEFENDANTS-APPELLANTS IN COURT BELOW,

Petitioners,

vs.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY, APPELLEE IN COURT BELOW,

Plaintiff-Respondent.

BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

Abstract

The nature and basis of this action is clearly set forth in the foregoing petition (pages 3-5) and also in the opinion of Judge Hand in the Circuit Court of Appeals (R. 65-69) and does not need to be repeated.

ARGUMENT

Point I

"The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

U. S. v. *McCord,* 233 U. S. 157, 162, 58 L. Ed. 893, 897.

The foregoing was the construction which this Court placed upon the Heard Act, which preceded the Miller Act under which this action is brought.

In accordance with that rule it was held that compliance with the requirements as to conditions precedent are jurisdictional and that if there was a failure of such compliance no action could be maintained in respect to the following matters:

1. If brought before the six months period specified in the statute, even though the event proved that the United States did not bring an action at all.

U. S. v. *McCord (supra);*

Illinois Surety Co. v. *U. S.,* 240 U. S. 214, 217, 60 L. Ed. 609, 613.

2. The action could not be maintained unless commenced before the expiration of the period of one year after performance and final settlement.

The words of the statute made this clear. The rule, general in its application, has been established by prior decisions of this Court so clearly that no new declaration on that subject was necessary.

Harrisburg v. *Richards,* 119 U. S. 199, 214, 30 L. Ed. 358.

When Congress came to enact the Miller Law, it must have had in mind the judicial construction which had been placed upon the Heard Act. It had been held that a materialman of a subcontractor was protected by the surety bond even though the general contractor had fully paid the subcontractor without any knowledge of the unpaid account of the materialman.

Hill v. *American Surety Company*, 200 U. S. 197, 50 L. Ed. 437;
Smith v. *Mosher*, 169 Fed. 430;
Mankin v. *U. S.*, 215 U. S. 533, 54 L. Ed. 315.

In many cases this created a most unjust situation compelling double payment either by the contractor or by his surety. To obviate that unjust situation Congress inserted in the Miller Act a new condition, namely that a materialman of a subcontractor should have no right of action unless notice should be given to the contractor.

To obviate all disputes as to what may, or may not, have been said at a given time the notice was required to be in writing.

The statute provided a substituted service by mail, but to obviate all disputes as to where it was sent, or when received, it required that, if that means of substitution should be adopted, it must be by registered mail so that proof could be made either by the returned receipt, or, lacking that, by the postoffice department. Experience had demonstrated clearly that the temptation to falsely assert mailing, on the one hand, or, on the other, to falsely deny receipt of the mail, was often too strong to be overcome.

The rule adopted by the court below (in spite of the plain language of the statute) to the effect that written notice received by the contractor obviated the necessity of statutory notice would nullify the statute entirely. Logically it would follow that actual knowledge however acquired would

have the same effect, leaving the whole matter of notice open to dispute and thwarting the plain legislative intent.

Point II

Under the general rules of statutory construction clearly and well established, any notice required by statute to be given must be given personally unless the statute directs some means of substituted service. In that event the substituted service provided for by the statute must be strictly followed. This statute provided for substituted service by mail but specifically provided that when mailed it must be by registered mail.

Whenever mailed in some other way than by registered mail, it is not a substitution authorized by the statute and is a nullity.

Thatcher v. *Powell,* 6 Wheat. 119, 5 L. Ed. 221;
Burck v. *Taylor,* 152 U. S. 634, 654, 38 L. Ed. 578, 585.

The leading case on this subject frequently cited and never questioned is

Rathburn v. *Acker,* 18 Barb. 393.

The decisions of the New York State courts have uniformly followed the above cited case ever since its decision.

McDermott v. *Board of Police,* 25 Barb. 635;
Re Blumberg, 149 App. Div. 303;
Steinhardt v. *Bingham,* 182 N. Y. 326, 329;
People, ex rel., v. *L. & B. R. R. Co.,* 13 Hun. 211;
Mitchell v. *Clary,* 20 Misc. 595, 597;
Boland v. *Sokolski,* 56 Misc. 333;
Re Sullivan, 31 Misc. 1, 4; affd. 53 App. Div. 637.

The lower Federal courts have also followed the rule laid down in *Rathburn* v. *Acker* (*supra*).

Haldane v. *U. S.,* 69 Fed. 819, 822;
Lyon v. *Davis,* 95 F. (2d) 103.

Also the Second Circuit, Court of Appeals, from whose decision this appeal is taken.

Re Leterman, Becher & Co., 260 Fed. 543.

The same has been the rule in many other jurisdictions. We cite some of the leading cases, but there are many others and none so far as we can find in conflict.

Reed v. *Allison*, 61 Cal. 461;
Moore v. *Bessie*, 35 Cal. 184;
Harris v. *Minn. Inv. Co.*, 89 Cal. App. 396, 265 Pac. 306;
Smith v. *Smith*, 4 Green (Iowa) 266;
Harbacheck v. *Moorland Tel. Co.*, 208 Ia. 552, 226 N. W. 171;
Allen v. *Strickland*, 100 N. C. 225, 6 S. E. 780;
Weiner v. *Commercial Cas. Co.*, 109 N. J. L. 119;
Am. Fire Ins. Co. v. *Banks*, 83 Md. 22, 34 A. 373.
People v. *Turnpike Co.*, 30 Cal. 182;
Clark v. *Adams*, 33 Mich. 159, 164.

New York cases where the notice is jurisdictional are as follows:

Reinig v. *City of Buffalo*, 102 N. Y. 308;
Curry v. *City of Buffalo*, 135 N. Y. 366;
Whitmyer v. *International Business Machine Co.*, 267 N. Y. 28;
Carson v. *Village of Dresden*, 202 N. Y. 414;
Cuccia v. *Roberts*, 204 App. Div. 653;
Ottobein v. *B. & C. Co.*, 272 N. Y. 149, 154.

It may, therefore, be stated with confidence that this rule is well established as a general proposition of law with respect to notice.

Judge Hand in his opinion in the Circuit Court of Appeals (see p. 9) said:

> "The following sentence provides how the notice is to be served but contains no language making the right of action dependent upon the mode of service."

This language cannot be sustained on any logical rule of reasoning. The statute makes the right dependent upon written notice. The portion of the statute referred to by Judge Hand defines as definitely and positively as it is possible for language to express it that service by mail shall be by registered mail, thereby simply defining how the notice shall be served. Except for that provision the general rule would apply and the service would necessarily have to be personal. Where a specific substitute for personal service is authorized no other substitute can be made available.

Point III

The authorities cited by the Circuit Court of Appeals (R. 69-70) and the District Court (R. 38 and 39) to sustain the so-called liberal construction of the Heard Law are not applicable to any of the conditions mentioned in the preceding Point II hereof.

The courts have never taken jurisdiction by means of any liberal construction of the statute. After the action has been commenced strictly in accordance with the statute, liberality of construction as to subsequent procedural matters may be invoked but not otherwise.

In the case of *U. S. for use of Bryant* v. *N. Y. Steamfitting Co., etc.*, 235 U. S. 327, 337, 59 L. Ed. 253, the court said:

> "The act of Congress is undoubtedly ambiguous. Indeed, considering the letter only of the three provisions with which we are concerned, they absolutely repel accommodation. We must try, however, to give coherence to them and accomplish the intention of Congress."

The opinion then continues to point out ambiguities and uncertainties, cites the *McCord* case *(supra)* and does not in any manner tend to attempt to overrule it.

In *Fleischmann* v. *U. S.*, 270 U. S. 349, 360, 70 L. Ed. 624, 631, the court again passed upon inconsistencies and ambiguities saying:

> "In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfill its whole purpose."

Both of the foregoing cases, therefore, deal with the construction of an ambiguous provision of the statute and nothing more. There is nothing in the Miller Act which is ambiguous.

In *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, 61 L. Ed. 1206, 1211, the court said:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, *if the suit was brought within the period prescribed by the act.* Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute."

The italics are ours. We submit that states the true rule of law.

In *Vermont Marble Company* v. *National Surety Company*, 213 Fed. Rep. 429, cited in the *Bryant* case *(supra)*, it is stated at page 433 of the opinion:

> "Unquestionably, the limitation incorporated in the right to sue as conferred by the Act, upon those furnishing labor and material to the contractor, that such suit or intervention must be instituted within one year from the completion of the contract, and the provision

that only one suit can be brought, in which other creditors may intervene *are limitations upon the right of action as conferred by the statute and are jurisdictional.* They are obviously *intended for the benefit of such sureties* on the bond as are the defendants in the present case; while the last provision of the statute, requiring notice to known creditors, and publication of notice for three months and three weeks prior to the expiration of the year within which such suits are authorized to be brought, was just as obviously for the benefit of the creditor alone."

Again the italics are ours. The decision from the State of Kansas cited by the Circuit Court of Appeals at page 71 of the opinion was in accord with the foregoing and not in conflict therewith as stated.

In the *Bredlove* v. *General Baking Company,* 138 Kas. 143, the rule is declared without any argument as to informality in the mailing.

In *Weaver* v. *Shankland Walnut Company,* 131 Kas. 773, the service of the notice was irregular but it was accepted and acted upon, and it was only after such acceptance and action that the question was raised. Logically it was held to be a waiver.

In *Eckel* v. *Sinclair Refining Co.,* 133 Kas. 285, and in *Horn* v. *Elliott,* 132 Kas. 454, no question was raised, nor was there any discussion about the sufficiency of the notice.

See also the following cases sustaining our contention:

Smith Iron Works v. *Maryland Casualty Company,* 275 Mass. 74;

New Britain Lumber Co. v. *American Surety Company,* 113 Conn. 1;

Texas Co. v. *Schriewer,* 38 S. W. (2d) 141;

Southern Surety Co. v. *Jenner,* 212 Ia. 1027;

Constance v. *Leigh,* 122 Oh. St. 468;

Republic National Bank & Trust Co. v. *Massachusetts Bonding & Ins. Co.*, 68 F. (2d) 445;
Empire State Surety Co. v. *City of Des Moines*, 152 Ia. 531;
Silver v. *F. & B. Co.*, 53 Pac. (2d) 459, 40 New Mexico 33.

For the reasons above mentioned, as well as those expressed in the foregoing petition, it is respectfully urged that the prayer of the petition should be granted and that the decision of the Circuit Court of Appeals for the Second Circuit, referred to, should be reversed by this Court under writ of certiorari.

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